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September 20, 1983

A-182
(83-334)

Alexander L. Stevas, Clerk
Supreme Court of the United States
1 First Street, N. E.
Washington, D. C. 20543

Re: Board of School Commissioners of Mobile County, Alabama, et al. v. Leila G. Brown, et al., United States of America, No. 83-334 (U.S.)

Dear Mr. Stevas:

Yesterday afternoon, the undersigned counsel were advised that Justice Powell denied the Application for Stay of Enforcement of Judgment appellants in the above-referenced action filed on September 14, 1983. Pursuant to Sup.Ct.R. 43, appellants hereby seek renewal to Justice Stevens of the foregoing Application. In the event Justice Stevens denies the Application, appellants request that Justice Stevens be requested to refer the Application to the Court for its determination.

As mentioned in my letter to you of September 14, 1983, the primary elections at present are scheduled for September 27, 1983. Accordingly, appellants further request that the Application be distributed as promptly as possible to Justice Stevens.

Thank you very much for your attention to this matter.

Sincerely,

Charles S. Rhyne
Counsel for Appellants

CSR:mm

cc: All Counsel

No. 83-334

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ALABAMA, et al.,

Defendants-Appellants,

v.

LEILA G. BROWN, et al.,

Plaintiffs-Appellees,

UNITED STATES OF AMERICA,

Plaintiff-Intervenor and Appellee.

A-182

Denied
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On Appeal from the United States
Court of Appeals for the Eleventh Circuit

APPLICATION FOR STAY OF ENFORCEMENT OF JUDGMENT

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v.

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UNITED STATES OF AMERICA,

Plaintiff-Intervenor and Appellee.

On Appeal from the United States
Court of Appeals for the Eleventh Circuit

APPLICATION FOR STAY OF ENFORCEMENT OF JUDGMENT

To the Honorable Lewis F. Powell, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Eleventh Circuit:

Pursuant to Sup. Ct. R. 44, defendants-appellants Board of School Commissioners of Mobile County, Alabama ("School Board") and the members thereof elected at-large, through counsel, hereby apply for a stay enforcement of the Judgment of the United States Court of Appeals for the Eleventh Circuit in Brown v. Board of

School Commissioners of Mobile County, Alabama, 706 F.2d 1103 (11th Cir. 1983) (a copy of the Eleventh Circuit's decision is attached hereto as Appendix A) and the Order Denying Defendants' Motion To Stay, et al., Brown v. Board of School Commissioners of Mobile County, Alabama, Civ. Act. No. 75-298-P (S.D. Ala. Aug. 3, 1983) (a copy of this Order is attached hereto as Appendix B), as amended, Brown v. Board of School Commissioners of Mobile County, Alabama, Civ. Act. No. 75-298-P (Aug. 4, 1983) (Amendment to August 3, 1983 Order Denying Defendants' Motion To Say, et al.) (A copy of this Amendment is attached hereto as Appendix C); Brown v. Board of School Commissioners of Mobile County, Alabama, Civ. Act. No. 75-298-P (S.D. Ala. Aug. 8, 1983) (Order Amending Footnote 2 in Order Denying Defendants' Motion To Stay, et al., Dated August 3, 1983) (a copy of this Amendment is attached hereto as Appendix D); Brown v. Board of School Commissioners of Mobile County, Alabama, Civ. Act. No. 75-298-P (S.D. Ala. Aug. 9, 1983) (Amendment to This Court's Order Dated August 3, 1983) (a copy of this Amendment is attached hereto as Appendix E), and the Judgment, Brown v. Board of School Commissioners of Mobile County, Alabama, Civ. Act. No. 75-298-P (S.D. Ala. Aug. 3, 1983) (a copy of the Judgment is attached hereto as Appendix F) as amended, Brown v. Board of School Commissioners of Mobile County, Alabama, Civ. Act. No. 75-298-P (S.D. Ala. Aug. 4, 1983) (Amendment to Judgment) (a copy of this Amendment is attached hereto as Appendix G), the district court issued in consequence of the Eleventh Circuit's decision, so that, pending the decision on the appeal to the Supreme Court of the Eleventh Circuit's decision, elections for the School Board will be stayed. Alternatively, if a stay is not granted, appellants request an order directing the

district court to modify its August 3, 1983 Order and Judgment, as amended, so that, once elections are held, each school board district will be represented by one commissioner residing in that district, rather than one district being represented by two (2) commissioners and another district not being represented by any commissioner, all eligible voters will have been allowed to vote for the same number of commissioners and with the same degree of frequency, rather than some voters having been allowed to vote for two (2) commissioners in three (3) years and others having been denied the right to vote for any commissioner for ten (10) years, and all commissioners elected from single-member districts will be enjoined from taking any action to discontinue or otherwise to affect the appeal of the Eleventh Circuit's decision.

The grounds supporting this application are as follows:

Litigation History

1) This suit was filed in 1975 by the individual appellees, other than the United States, on behalf of themselves and the class of all black citizens of the County of Mobile, Alabama ("Mobile") to challenge the at-large system of electing persons to the School Board;
2) Pursuant to Alabama law, in November, 1976 two persons were elected at-large, for six-year terms, to the School Board;
3) On December 9, 1976, the district court entered its opinion and order, amended on December 13, 1976, finding that the at-large system "results in an unconstitutional dilution of black voting strength" and, therefore, invalidating that system, Brown

v. Moore, 428 F. Supp. 1123, 1138 (S.D. Ala, 1976

4) As relief, the court imposed a remedy, submitted by appellees, which

a) divided Mobile into five (5) single-member districts, id. at 1144,

b) apportioned the districts so that there were two districts, Districts 3 and 4, with black population majorities, and so that there was a total population deviation of 6.3 percent, id. at 1144, 1145,

c) provided for the phasing-in of the remedy so that,

(i) in 1978, two (2) commissioners were to be elected from Districts 3 and 4, id. at 1145, instead of electing only one commissioner as otherwise would have been required under Alabama law, see id.,

(ii) in 1980, one commissioner was to be elected from District 5, Brown, 428 F. Supp. at 1144 instead two commissioners as otherwise would have been required under Alabama law, see id., and

(iii) in 1982, two (2) commissioners were to be elected from Districts 1 and 2 as would have been required under Alabama law, Brown, 428 F. Supp. at 1144;

d) allowed those who had been elected at-large to serve out the full terms for which they had been elected by providing that, for the two-year period between 1978, and 1980, the

School Board would consist of six (6) members, id. at 1145-46, but that

(i) one of the two members whose terms was to expire in 1980 (either Commissioner Drago or Commissioner Alexander), prior to the 1978 election, was to be voted President or Chairperson of the School Board for the two year period, id. at 1145, and

(ii) that person was to become a non-voting member of the School Board (except in the case of a tie), [1] id. at 1145-46,

e) required each commissioner elected from a single-member district to have been a resident of the district he or she was to represent for one year preceding that person's election and to reside in that district during that person's term of office, id. at 1144, and

f) except for the changes set forth in the order, retained the qualifying, eligibility and other requirement of Alabama law pertaining to the Mobile School System and elections thereto, including the staggered, six-year term and five (5)-member board requirements;

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[1] That part of the order was amended in 1978 so that Commissioner Alexander was to serve as the non-voting Chairperson for one year, beginning November 15, 1978, and Commissioner Drago was to serve one year. Brown v. Moore, Civ. Act. No. 75-298-P (S.D. Ala. Nov. 24, 1978) (Order on Selection of School Board Chairman and on Plaintiff's Motion to Enjoin New Board Policies, etc.).

5) Appellants appealed the district court's decision to the United States Court of Appeals for the Fifth Circuit;

6) On May 19, 1978, appellants sought from the district court a stay of the elections scheduled for that year, and on May 31, 1978, the court denied appellants' motion, Brown v. Moore, Civ. Act. No. 75-298-P (S.D. Ala. May 31, 1978) (Order Denying Defendants' Motion for a Stay);

7) On June 2, 1978, the Fifth Circuit affirmed the district court's decision on the merits, Brown v. Moore, 575 F. 2d 298 (5th Cir. 1978), and on July 20, 1978, denied appellants' motion for stay and recall of the mandate pending appeal to the Supreme Court, Brown v. Moore, No. 77-583 (5th Cir. July 20, 1978) (Order);

8) Appellants appealed the Fifth Circuit's decision on the merits [2] and on October 26, 1978, sought a stay pending that appeal;

9) On October 30, 1978, the Supreme Court noted probable jurisdiction over the appeal of the Fifth Circuit's decision on the merits, Williams v. Brown, 439 U.S. 925 (1978);

10) On October 31, 1978, Justice Powell denied the application for a stay pending appeal, [3] Moore v. Brown,

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[2] On October 16, 1978, applicants sought from the district court a stay of elections which, on October 20, 1978, that court denied, Brown v. Moore, Civ. Act. No. 75-298-P (S.D. Ala. Oct. 1978) (Order).

[3] Justice Powell originally had granted a stay. Moore v. Brown No. A-386 (U.S. Oct. 27, 1978) (Powell, Circuit Justice).

No. A-386 (No. 78-357) (U.S. Oct. 31, 1978) (Order) (Powell, Circuit Justice);

11) Accordingly, elections for single-member Districts 3 and 4 were held in 1978, and two blacks were elected (Commissioners Gilliard and Cox), and at present are serving, from those districts, Brown v. Board of Commissioners of Mobile County, Alabama, Civ. Act. No. 75-298-P, typescript op. at 4 (S.D. Ala. Aug. 3, 1983) (Order Denying Defendants' Motion To Stay, et al.);

12) In light of the Court's decision in City of Mobile, Alabama v. Bolden, 446 U.S. 55 (1980), on April 22, 1980, the Court vacated the Fifth Circuit's decision on the merits and remanded the case to that court for further proceedings consistent with the decision in Bolden, Williams v. Brown, 446 U.S. 236 (1980);

13) The Fifth Circuit, in turn, remanded the case to the district court, and respondents moved that court for a preliminary injunction seeking to preserve the status quo pending a decision on remand;

14) On July 25, 1980, the district court entered an Order on Motion for a Preliminary Injunction Preserving Status Quo Pending Final Judgment on Remand ("Injunctive Order"), Brown v. Moore, Civ. Act. No. 75-298-P (S.D. Ala. July 25, 1980), providing in part that

a) Commissioners Gillard and Cox, elected in 1978 from single-member Districts 3 and 4, were to continue serving on the School Board, id. at 7,

b) the election scheduled for 1980 for a commissioner from single-member District 5 was to go forward in accordance with the December, 1976 decision that had been vacated by virtue of the Supreme Court's decision in Williams, id.,

c) the boundaries of the school board districts the court had imposed were to remain unchanged, id.,

d) the residency requirements the court had imposed were to remain, id. at 7-8,

e) Commissioner Alexander was to serve out his term as the non-voting President of the School Board, id. at 8, and

f) Commissioners Gilliard and Cox were enjoined from voting on whether an appeal should be taken, id. at 9;

15) Appellants sought a stay of the Injunctive Order, which on August 19, 1980, the district court denied, Brown v. Moore, Civ. Act. No. 75-298-P (S.D. Ala. Aug. 19, 1980) (Order on Defendants' Application for a Stay in Part Filed August 6, 1980, in This Court with Reference to This Court's July 25, 1980 Order);

16) Appellants appealed the Injunctive Order to the Fifth Circuit and moved that court to stay the Injunctive Order;

17) On August 26, 1980, the Fifth Circuit denied the stay, Brown v. Moore, No. 80-7610 (5th Cir. Aug. 26, 1980), and appellants applied to Justice Powell for a stay;

18) On August 29, 1980, Justice Powell denied the application, Moore v. Brown, No. A-195 (U.S. Aug. 29, 1980), (Powell, Circuit Justice); [4]

19) The Fifth Circuit expedited its consideration of the appeal of the Injunctive Order, and on October 30, 1980, issued a decision, Brown v. Moore, No. 80-7610 (5th Cir. Oct. 30, 1980), affirming in part and vacating and remanding in part the Injunctive Order so that

a) single-member district Commissioners Gilliard and Cox were to continue to serve as Commissioners, but were to continue to be enjoined from voting on whether an appeal should be taken, id., type-script op. at 2,

b) the election scheduled for a commissioner from single-member District 5 was to go forward, but that certification of the results was to be held in abeyance pending entry of a final judgment on remand, id., 3,

c) the boundaries of the school board districts and the residency requirements the district court had imposed were to remain, id. at 2,

d) Commissioner Alexander was to continue serving as President of the School Board pending entry of a final judgment on remand, id., and

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[4] On September 5, 1980, Justice Powell issued an opinion concerning his denial of the stay. Moore v. Brown, 448 U.S. 1335 (1980) (Powell, Circuit Justice).

e) Commissioner Drago, who was running for commissioner from single-member District 5, was to continue serving as an at-large commissioner until the entry of a final judgment on remand, id. at 3;

20) The 1980 elections for a commissioner from single-member District 5 were held, Commissioner Drago was elected and the certification of the results was, and still is, held in abeyance, Brown v. Board of School Commissioners of Mobile County, Alabama, Civ. Act. No. 75-298-P, typescript op. at 5-6, 20 n.2 (S.D. Ala. Aug. 3, 1983) (Order Denying Defandants' Motion To Stay, et al.);

21) On November 7, 1980, the United States moved to intervene as plaintiff, and on December 24, 1980, its motion was granted, Brown v. Board of School Commissioners of Mobile County, Alabama, Civ. Act. No. 75-298-P (S.D. Ala. Dec. 24, 1980) (Order On Intervention of United States);

22) On April 15, 1982, the district court entered its decision on remand finding that the at-large system of electing Mobile's school board members was established and was being maintained for a discriminatory purpose and, therefore, concluding that the at-large system violated the fourteenth and fifteenth amendments to the United States Constitution and section 2 of the Voting Rights Act of 1965, 42 U.S.C. §1973 (1976),

Brown v. Board of School Commissioners of Mobile County, Alabama, 542 F. Supp. 1078 (S.D. Ala. 1982); [5]

23) On May 12, 1982, the court issued a Final Judgment and Injunction, Brown v. Board of School Commissioners of Mobile County, Alabama, Civ. Act. No. 75-298-P (S.D. Ala. May 12, 1982), enjoining appellants and others from conducting elections for the School Board under the at-large system, providing that the School Board was to continue operating as it had been until further orders of the court and enjoining Commissioners Gilliard and Cox, from voting on whether an appeal should be taken;

24) Thereafter, appellants sought an order staying implementation of a single-member district election system for the 1982 elections;

25) On July 22, 1982, the court issued an Order Granting Stay, Brown v. Board of School Commissioners of Mobile Alabama, Civ. Act. No. 75-298-P (S.D. Ala. July 22, 1982), continuing in force the Final Judgment and Injunction the court had entered on May 12, 1982, and staying elections for the School Board pending appeal of the court's April 15, 1982 decision to the Eleventh Circuit;

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[5] The court withheld entry of a remedial order to allow the Alabama Legislature the opportunity to enact a remedial election plan which satisfied constitutional standards. Brown v. Board of School Comm'rs of Mobile County, Ala., 542 F.Supp. at 1107. The Legislature did not pass such a remedial plan. Brown v. Board of School Comm'rs of Mobile County, Ala., Civ. Act. No. 75-298-P, typescript op. at 1 (S.D. Ala. July 22, 1982) (Order Granting Stay).

26) Also on July 22, 1982, the court entered an Order Adopting the Proposed Redistricting Plan Submitted by the United States of America, Brown v. Board of School Commissioners of Mobile County, Alabama, Civ. Act. No. 75-298-P (S.D. Ala. July 22, 1982), adopting the reapportionment plan, based on the 1980 census, the United States, as plaintiff-intervenor, had submitted; 6/

27) On May 26, 1983, respondents moved to dissolve the stay of elections, and on June 6, 1983, the Eleventh Circuit issued its decision affirming the district court's decision on the merits, Brown v. Board of School Commissioners of Mobile County, Alabama, 706 F.2d 1103 (11th Cir. 1983); 7/

28) Appellants moved the district court to continue the stay of elections pending their appeal of the Eleventh Circuit's decision to the Supreme Court;

29) On August 3, 1983, the district court entered an Order Denying Defendants' Motion To Stay, et al., Brown v. Board of School Commissioners of Mobile County,

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6/ Subsequently, the court somewhat modified the reapportionment plan. Brown v. Board of School Comm'rs of Mobile County, Ala., Civ. Act. No. 75-298-P (S.D. Ala. Aug. 8, 1983) (Order on Plaintiffs' Motion for Modification of Districts).

7/ Because it concluded that the district court's finding of intent was not clearly erroneous, the Eleventh Circuit did not reach the question whether the district court's decision could be affirmed under amended section 2 of the Voting Rights Act of 1965, 42 U.S.C.A. §1973 (West Supp. 1983). Brown, 706 F.2d at 1106 n.5.

Alabama, Civ. Act. No. 75-298-P (S.D. Ala. Aug. 3, 1983), [8] and a Judgment, Brown v. Board of School Commissioners of Mobile County, Alabama, Civ. Act. No. 75-298-P (S.D. Ala. Aug. 3. 1983), [9] ordering a special election for the School Board to be held on November 8, 1983, to elect elect commissioners from single-member Districts 1 and 2, as apportioned in the court's July 15, 1982 order, as amended, and providing for party primaries to be held, if desired by the (political) parties on September 27, 1983, and, if a run-off is necessary, on October 18, 1983;

30) On August 5, 1983, appellants moved the court for reconsideration of its August 3, 1983 Order and Judgment, [10] which on August 8, 1983, the court denied, Brown v. Board

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[8] The court amended the order on August 4, 1983, Brown v. Board of School Comm'rs of Mobile County, Ala., Civ. Act. No. 75-298-P (S.D. Ala. Aug. 4, 1983) (Amendment to August 3, 1983 Order Denying Defendants' Motion To Stay, et al.), August 8, 1983, Brown v. Board of School Comm'rs of Mobile County, Ala. (S.D. Ala. Aug. 8, 1983) (Order Amending Footnote 2 in Order Denying Defendants' Motion To Stay, et al., Dated August 3, 1983), and August 9, 1983, Brown v. Board of School Comm'rs of Mobile County, Ala. (S.D. Ala. Aug. 9, 1983) (Amendment to This Court's Order dated August 3, 1983).

[9] On August 4, 1983, the court amended the Judgment. Brown v. Board of School Comm'rs of Mobile County, Ala., Civ. Act. No. 75-298-P (S.D. Ala. Aug. 4, 1983) (Amendment to Judgment).

[10] Respondents, other than the United States, also requested the court to modify its August 3, 1983 Order and Judgment, as amended, to provide that elections for single-member Districts 1 and 5 will be held in 1983, and elections for single-member District 2 will be held in 1986, or, alternatively, that the designations of single-member Districts 2 and 5 will be switched. Plaintiffs' Response to Defendants' Motion for Reconsideration at 2. Respondents made this request on the grounds that, if elections are held in 1983, for single-member District 2 "a substantial portion of the present District 2 electorate will have voted for 2 commissioners in 3 years and most of the electorate in District 5 will be deprived of the right to vote in a school board election between 1976 and 1986." Id. The court did not act on respondents' request.

of School Commissioners of Mobile County, Alabama, Civ. Act. No. 75-298-P (S.D. Ala. Aug. 8, 1983) (Order on Motion for Reconsideration); (a copy of this Order is attached hereto as Appendix H);

31) On August 15, 1983, appellants filed a Notice of Appeal of the district court's August 3, 1983 Order and Judgment, as amended, and on August 18, 1983, moved the Eleventh Circuit for a stay of elections pending appeal to the Supreme Court of the Eleventh Circuit's June 6, 1983 decision or, alternatively, for an order directing the district court to schedule elections for single-member District 5 and to make provisions so that the residents of District 2 will not have elected two (2) commissioners within three (3) years;

32) On August 30, 1983, the Eleventh Circuit denied appellants' motion, Brown v. Board of School Commissioners of Mobile County, Alabama, No. 83-7459 (11th Cir. Aug. 30, 1983) (a copy of this denial is attached hereto as Appendix I);

33) Also on August 30, 1983, appellants docketed in the Supreme Court their appeal of the Eleventh Circuit's June 6, 1983 decision (No. 83-334);

Reasons for Granting the Relief Requested

34) This Court consistently has emphasized that, in fashioning remedial election systems and reapportionment plans, federal courts are held to a high standard, which standard is higher than the standard to which legislative bodies are held in performing the same functions, e.g., Upham v. Seamon, 456 U.S. 37, 42

(1982); Wise v. Lipscomb, 437 U.S. 535, 541 (1978) (plurality opinion); id. at 550 (Marshall, J. dissenting); Connor v. Finch, 431 U.S. 407, 414 (1977);

35) The remedy the district court imposed would not satisfy even the standards for a "legislative plan" because, if elections are held pursuant to the court's August 3, 1983 Order and Judgment, as amended, persons in one district will have been allowed to vote for two (2) commissioners in three (3) years while persons in another district will not be allowed to vote for any commissioner for ten (10) years and one district will be represented by two (2) commissioners while another district will be unrepresented, 11/

a) when Commissioner Drago was elected in 1980, the districts were apportioned

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11/ This is based on the assumption the court intended to continue the residency requirements of its previous orders, see supra pp. 5,8,9. The court's August 3, 1983 Order and Judgment, as amended, did not provide a comprehensive remedy but, rather, was limited in scope to ordering elections to be held for commissioners from Districts 1 and 6. In view of the court's previously having imposed a residency requirement in other orders, which were more comprehensive and appear to have established the system under which the court, in its August 3, 1983 Order and Judgment, as amended, now has ordered elections, it is reasonable to assume that the court intended to require each commissioner to have lived in, and to live in for his or her tenure each in office, the district from which he or she is elected. If so, it is noteworthy that, as discussed at 9 infra, Commissioner Drago no longer lives in District 5 and, as applied to her, the residency requirement is not satisfied.

If it cannot be assumed that the court intended to continue the residency requirement, the absence of such a requirement, in and of itself, would raise questions as to the validity of the court's remedial order, particularly because commissioners from other single-member districts were elected with the residency requirement in effect and because it would allow persons to run for a district without actually having to reside therein.

based on the 1970 census and Commissioner Drago was elected from what was then District 5, Affidavit of Joe McEarchern ¶3 (Mr. McEarchern is the Chief Clerk of the Probate Court of Mobile, and his affidavit is attached to this application),

b) by virtue of the 1980 census and the district court's having adopted the reapportionment plan the United States submitted,

(i) Commissioner Drago now lives in District 4, the same District in which Commissioner Cox, who was elected in 1978, lives, id., ¶5,

(ii) Most of the people who live in District 5, as apportioned at present, previously lived in District 2, id. ¶7, and

(iii) A substantial number of the persons who live in District 2, as apportioned at present, previously lived in District 5, id. ¶6,

c) if, pursuant to the court's August 3, 1983 Order and Judgment, as amended, an election is held for Districts 1 and 2 and the election results of Commissioners Drago's election are certified, 12/

12/ The court indicated its intent to certify those results. See Brown v. Board of School Comm'rs of Mobile County, Ala., Civ. Act. No. 75-298-P, typescript op. at 20 n. 2 (S.D. Ala. Aug. 3, 1983) (Order).

(i) the persons living in District 4, which consists of 72,512 persons, Brown v. Board of School Commissioners of Mobile County, Alabama, Civ. Act. No. 75-298-P, typescript op. at 2 (S.D. Ala. Aug. 8, 1983) (Order on Plaintiffs' Motion for Modification of Districts), will be represented by two (2) commissioners, at least until 1986, [13] when Commissioner Drago's term is to expire, [14] see Affidavit of Joe McEarchern ¶¶4,5,

(ii) the persons living in District 5, which consists of 72,311 persons, Brown v. Board of School Commissioners of Mobile County, Alabama, Civ. Act. No. 75-298-P, typescript op. at 2 (S.D. Ala. Aug. 8, 1983) (Order on Plaintiffs' Motion For Modification of Districts), will have no representative until 1986, Affidavit of Joe McEarchern ¶8,

(iii) when elections are held in 1986, most of the electors living in District 5 will not have voted for ten (10) years, since 1976, when they voted for two (2) at-large commissioners, id. ¶6, and

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[13] Commissioner Cox was elected from District 4 in 1978 and an election for his position is scheduled for 1984.

[14] That Commissioner Drago would become a Commissioner for District 4 is due primarily to the fact that she no longer lives in District 5 and that, if she runs again for the School Board, she will run for and will be responsive to the needs of the people living in, District 4. Following the expiration of her term, the next election in which Commissioner Drago may run is the 1990 election for District 4.

(iv) a substantial number of the electors living in District 2 will have been allowed to vote twice in three (3) years, id., once in 1980 for the position for which Commissioner Drago was elected, and once in 1983 for a commissioner from District 2;

36) By allowing some persons to be represented by two representatives and others none and by allowing some electors to vote twice in three (3) years and depriving others of the right to vote for ten (10) years, elections pursuant to the court's August 3, 1983 Order and Judgment, as amended, would result in a violation of the one person, one vote rule of Reynolds v. Sims, 337 U.S. 533 (1964), and its progeny and would cause greater harm than staying elections pending appeal of the Eleventh Circuit's June 6, 1983 decision,

a) if the Court reverses the Eleventh Circuit's decision, a stay pending appeal will facilitate greatly the return to at-large elections because, in the next election, four (4) at-large commissioners could be elected, or

b) in the event the Court upholds the Eleventh Circuit's decision, a stay pending appeal will provide the district court with the time necessary to devise an election

system which allows all persons to be represented equally and all electors to vote with the same degree of frequency; 15/

39) A stay of elections pending appeal will not harm respondents because, by virtue of the 1978 elections, there already are two black commissioners on the School Board and, according to the district court, it is unlikely that, under a single-member district system, respondents will be able to elect a third black commissioner, Brown v. Board of School Commissioners of Mobile County, Alabama, Civ. Act. No. 75-298-P, typescript op. at 9 (S.D. Ala. July 22, 1982) (Order Granting Stay);

40) If a stay is not granted, it is likely that appellants will be irreparably harmed because the School Board will be comprised exclusively of persons elected from single-member districts, and the court has not enjoined those persons, who are the direct beneficiaries of the

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15/ If the court notes probable jurisdiction, appellants anticipate that a decision could be rendered in time for the elections scheduled for 1984. Elections for four (4) commissioners could be held and the staggered term feature of the election system retained by providing that two (2) commissioners would serve four (4) years and two (2) commissioners would serve six (6) years. Although, under this scenario, the terms of two (2) commissioners would be shortened, under the district court's August 3, 1979 Judgment and Order, as amended, the terms of two (2) commissioners also would be shortened. Brown v. Board of School Comm'rs of Mobile County, Ala., Civ. Act. No. 75-298-P, typescript op. at 11 (S.D. Ala. Aug. 3, 1983) (Order).

single-member district system, from voting to discontinue the appeal; 16/

41) There is a reasonable probability that the Court will note probable jurisdiction over the Eleventh Circuit's June 6, 1983 decision striking down the at-large system of electing school board members and that the Court will reverse that decision,

a) the Court previously noted probable jurisdiction in this case over the Fifth Circuit's decision striking down the at-large election system and vacated that decision, see supra p. 7,

b) although based on different grounds, the same at-large system again has been invalidated,

c) the district court clearly erred in finding that the at-large system was created in 1876 and for a discriminatory purpose, Brown v. Board of School Commissioners of Mobile County, Alabama, 542 F. Supp. 1078, 1083-90, 1105 (S.D. Ala. 1982), particularly after it previously had found that the at-large system was created in 1919 and for a non-discriminatory purpose, Brown v. Moore, 428 F. Supp. 1123, 1135, 1137-38 (S.D. Ala. 1976),

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16/ Previous orders of the court enjoined only Commissioners Gilliard and Cox from voting on whether an appeal could be taken. See supra pp. 8, 9, 11.

d) the Eleventh Circuit erred in affirming the findings in the district court's 1982 decision particularly where it observed that the 1876 statute on which the district court relied was simply a reenactment of an earlier statute which was not enacted for a discriminatory purpose, Brown v. Board of School Commissioner of Mobile County, Alabama, 706 F.2d 1103, 1107 (11th Cir. 1983),

e) the Eleventh Circuit also erred in concluding that the alleged present effects of past discrimination could show that the at-large system was established for discriminatory purposes, see id., and in further concluding that the alleged present effects of past discrimination could show that the at-large system was being maintained for a discriminatory purpose, id., particularly where the inquiry was directed at the actions of the School Board members rather than the Alabama Legislature which is the body responsible for the at-large system and which is not a party to this action, and

f) this court recently has noted probable jurisdiction in another action wherein an at-large election system was invalidated, Escambia County, Florida v.

McMillan, ___U.S.___, 103 S. Ct. 1766 (1983) (No. 82-1295); and

42) Even if the Court were not to note probable jurisdiction over, and/or to reverse the Eleventh Circuit's June 6, 1983 decision, there is a reasonable probability that, for the reasons set forth at 14-19 supra, the Court would grant review of and reverse a decision by the Eleventh Circuit affirming the District Court's August 3, 1983 Judgment and Order, as amended.

For the foregoing reasons, appellants request a stay of enforcement of the June 6, 1983 Judgment of the Eleventh Circuit and the August 3, 1983 Judgment and Order, as amended, issued in consequence of the Eleventh Circuit's June 6, 1983 decision, so that, pending the Supreme Court's decision on the appeal of the Eleventh Circuit's decision, elections for the School Board will be stayed. While certainly less satisfactory, in view of the serious constitutional deficiencies which would result from elections under the court's August 3, 1983 Judgment and Order, as amended, if a stay pending appeal is not granted, appellants alternatively request an order directing the district court to modify its August 3, 1983 Judgment and Order, as amended, so that, once elections are held, each school board district will be represented by one commissioner residing in that district, all eligible voters will have been allowed to vote for the same number of commissioners and with the same degree of frequency and all commissioners elected from single-member districts will be enjoined from taking any action to discontinue or otherwise to affect the appeal of the Eleventh Circuit's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas D. Silverstein, hereby certify that on this 14th day of September, 1983, I caused to be served one copy of the foregoing Application for Stay of Enforcement of Judgment and accompanying appendices and affidavit on the following:

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CABLE ADDRESS
CHABRHYNE

September 14, 1983

Alexander L. Stevas, Clerk
Supreme Court of the United States
1 First Street, N. E.
Washington, D. C. 20543

Re: Board of School Commissioners of Mobile County Alabama, et al. v. Leila G. Brown, et al., United States of America, No. 83-334

Dear Mr. Stevas:

Enclosed for filing in the above-referenced action is an Application for Stay of Enforcement of Judgment which seeks a stay of elections for the Board of School Commissioners of Mobile County, Alabama pending appeal to the Supreme Court. Because the primary elections at present are scheduled for September 27, 1983, appellants request the Application to be distributed to Justice Powell as promptly as possible.

Thank you very much for your attention to this matter.

Sincerely,

Charles S. Rhyne
Counsel for Appellants

CSR:mm

Enclosure

cc: All Counsel

want you to keep one thing in mind, and that is, if he wasn't doing this, what was Mr. Tobon doing?

. . . . . .

If Mr. Tobon was doing something other than using a trick, scheme or device to cover up material facts within the jurisdiction of the Department of the Treasury in a manner set out in the Indictment, I ask you to listen and wait and see if Mr. Almon tells you or suggests to you what else it may have been. (TII 208-09).

These statements were neither intended as nor of such character that a jury would naturally interpret them as a comment on the failure of Tobon to testify. *See United States v. Dearden*, 546 F.2d 622, 625 (5th Cir.1977); *United States v. White*, 444 F.2d 1274, 1278 (5th Cir.), *cert. denied*, 404 U.S. 949, 92 S.Ct. 300, 30 L.Ed.2d 266 (1971).

Judgment AFFIRMED.

Leila G. BROWN, et al., Plaintiffs-Appellees,

United States of America, Plaintiff-Intervenor,

v.

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ALABAMA, et al., Defendants-Appellants.

Leila G. BROWN, et al., Plaintiffs-Appellants,

v.

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ALABAMA, et al., Defendants-Appellees.

Nos. 82-7130, 82-7236.

United States Court of Appeals, Eleventh Circuit.

June 6, 1983.

Plaintiffs brought civil rights action challenging the at-large system of electing school commissioners in Mobile County, Alabama. The United States District Court for the Southern District of Alabama, Pittman, Chief Judge, 428 F.Supp. 1123, entered judgment for plaintiffs, and an appeal was taken. The Court of Appeals, 575 F.2d 298, affirmed. The Supreme Court, 446 U.S. 236, 100 S.Ct. 1519, 64 L.Ed.2d 181, vacated and remanded. On remand, the District Court, Pittman, Chief Judge, 542 F.Supp. 1078, concluded that the at-large election system had been adopted and maintained for the purpose of diluting black voting strength, in violation of the Voting Rights Act and the Fourteenth and Fifteenth Amendments, and Board of School Commissioners appealed. The Court of Appeals, James C. Hill, Circuit Judge, held that a District Court's findings were not clearly erroneous.

Affirmed.

1. Elections ⇐12

A racial vote dilution claimant must prove discriminatory intent.

2. Counties ⇐41

Court of Appeals' standard of review, in regard to district court's determination that the creation and maintenance of the Mobile County at-large election procedures were intentionally discriminatory, was to determine whether the district court's findings were clearly erroneous.

3. Constitutional Law ⇐274.2(3)

At-large election schemes are not per se unconstitutional, but maintenance of a purposely discriminatory vote-diluting at-large districting scheme comes within the purview of the Fourteenth Amendment. U.S.C.A. Const.Amend. 14.

4. Schools ⇐53(1)

District court's findings that the present effect of the Mobile County at-large school board election system, as a function of its original intent in 1876, "is to

enhance the discriminatory results of other forms of de jure and de facto discrimination in voting practices and procedures" and that such "other forms of discrimination in turn enhance the present effect of the at-large system, to deny equal access to the political system" were not clearly erroneous. U.S.C.A. Const.Amend. 14.

Robert C. Campbell, III, James C. Wood, Mobile, Ala., for Board of School Com'rs of Mobile County, Ala., et al.

Thomas H. Figures, Asst. U.S. Atty., Mobile, Ala., Paul F. Hancock, Irving Cornstein, Civil Rights Division, Dept. of Justice, Washington, D.C., for U.S.

Blacksher, Menefee & Stein, Larry T. Menefee, J.U. Blacksher, Mobile, Ala., W. Edward Still, Birmingham, Ala., for Leila G. Brown, et al.

Appeals from the United States District Court for the Southern District of Alabama.

Before HILL and ANDERSON, Circuit Judges, and LYNNE *, District Judge.

JAMES C. HILL, Circuit Judge:

This case arises out of a voting rights complaint involving a complex procedural and factual history which we will briefly summarize.[1]

PROCEDURAL HISTORY

In 1975, plaintiffs (now appellees) who represent a class of all black citizens in Mobile County, Alabama, filed suit against the Board of School Commissioners and its elected officials [hereinafter Board]. Plaintiffs alleged that the county's at-large method of electing Board members impermissibly diluted their voting strength in violation of the fourteenth and fifteenth amendment, and § 2 of the Voting Rights Act of 1965, 42 U.S.C.A. § 1973. The trial court, after a non-jury trial, held for the plaintiffs.[2] The trial court adopted, as a remedy to the discrimination, a plan whereby, the county would be divided into five single-member districts, two containing a majority black population. Board members would be elected from each district; at-large elections would no longer exist.

The Board appealed to the Court of Appeals for the Fifth Circuit, which summarily affirmed the trial court's decision.[3] The Supreme Court vacated and remanded for further proceedings in light of *City of Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980). *Williams v. Brown*, 446 U.S. 236, 100 S.Ct. 1519, 64 L.Ed.2d 181 (1980). The Fifth Circuit then remanded *Brown* to the district court for further proceedings. On remand to the district court, the United States intervened as a plaintiff. Another non-jury hearing was held before the district court. The court concluded that the at-large election system had been adopted and maintained for the purpose of diluting black voting strength, in violation of § 2 of the Voting Rights Act and the fourteenth and fifteenth amendments.[4] Defendant/Appellant Board now appeals from this order.

FACTS

Mobile County organized the first public school system in the State of Alabama in 1826. The statute enacted at that time specified the number of school board commissioners and the election procedures to be utilized. The election scheme called for at-large voting procedures.

In 1843, a new statute was enacted designating fifteen commissioners by name. However, the statute required that at the

* Honorable Seybourn H. Lynne, U.S. District Judge for the Northern District of Alabama, sitting by designation.

1. The historical facts in this case were vigorously contested. Our statement of facts is taken from the district court's findings of fact and a careful review of the entire record.

2. *Brown v. Moore*, 428 F.Supp. 1123 (S.D.Ala. 1976).

3. *Brown v. Moore*, 575 F.2d 398 (5th Cir.1978).

4. *Brown v. Board of School Commissioners of Mobile County, Alabama*, 542 F.Supp. 1078 (S.D.Ala.1982).

end of the new commissioners' terms, their successors would be elected rather than appointed.

In 1852, the number of commissioners was reduced to twelve and the election procedure was again premised on the at-large voting scheme. Although this statute underwent several amendments between 1852 and 1870, the at-large voting procedure remained the same.

In 1868, during the period known as "reconstruction," the Alabama Constitution provided for a new State Board of Education, with legislative power to enact laws regarding education. Mr. George Putnam was elected to the State Board of Education. During the same year Mr. Putnam was appointed as superintendent of the Mobile County Public Schools. Mr. Putnam planned to institute several new concepts into the Mobile school system which were heavily opposed by a number of whites. Because the "old board" was aware of Mr. Putnam's intent to create black schools, funded by "white money," Mr. Putnam was simply not allowed to post his bond to serve as superintendent. Consequently, Mr. Putnam was not able to assume the duties of his position. Eventually, through the efforts of the State superintendent, the "old board" was removed and Mr. Putnam assumed his position as superintendent. Mr. Putnam appointed a twelve member board of commissioners, three of whom were black. Although the old white board had been officially removed from office, its members continued to assert to the community that they were the only valid board. Both the new board and the old board claimed, simultaneously, to govern the Mobile County school system. After years of struggle between the two Boards, including lawsuits and jail sentences the new Board appeared to have prevailed.

Beginning sometime in 1870, Alabama began a period known as "redemption." During this period many state and local officials sought to regain and restore "white supremacy" to the governmental affairs of the state and to Mobile County. Through state and local elections the Democratic party mounted a major effort to eliminate blacks, and whites who identified with black interests, from holding any public offices. Mr. Joseph Hodgson, a Democratic party member was elected to the position of State Superintendent. As of 1870, the State Board of Education had reinstituted a law restoring the election, rather than appointment, of Mobile school commissioners. This statute provided:

> § 2. Board of commissioners—A board of school commissioners shall take the place of, and act as a board of directors for Mobile County, which board shall be composed of one county superintendent and twelve commissioners, three of which commissioners shall reside not less than seven miles from the courthouse of the present county, and of whom any seven shall constitute a quorum for the transaction of business.
>
> § 3. Manner of elections—The said superintendent and commissioners shall be elected on the first Saturday of March, 1871, and upon their first meeting the said commissioners shall classify so that four of their numbers shall hold office for two years from the day of election, four of their number for four years, and four of their number for six years, one of each class to be a member from outside the city; their successors to be elected to serve for six years from the day of their election; *Provided, That in the first election for commissioners only nine commissioners shall be voted for on any one ballot, and in succeeding elections only three shall be voted for upon any one ballot.* (emphasis added).

The purpose of allowing the voters to vote for only nine out of the twelve commissioners was to ensure minority representation. The twelve member school board was elected in March, 1871. The Democratic party successfully filled nine of the twelve seats, including the replacement of Mr. Putnam's position. Between 1871 and 1876 no further school board elections were held because the State Board of Education eliminated the two year terms in exchange for six year terms.

The Alabama legislature in 1876 started passing new laws in the spirit of redemption (white supremacy). As a part of the redemption program, the legislature passed a law eliminating the Mobile County School Board election system which had afforded minority access. The 1876 act, replacing the earlier 1870 election procedure, returned to the 1852 at-large election scheme which remained in effect until 1976 when this suit originally commenced. This act again provided for at-large elections on a county wide basis, requiring that two of the new nine member school board must reside within at least six miles of the county courthouse. The 1876 act further provided for staggered six year terms with three commissioners to be elected every two years. Additionally, the restriction against full-ticket balloting was eliminated. This act was amended in 1919, reducing the number of commissioners from nine to five yet still maintaining the at-large election procedure.

I. Purpose of the remand

The district court, in its original order, neglected to discern whether the at-large voting procedures were created with the intent to discriminate. The plurality opinion issued in *Bolden* concluded that a successful fourteenth amendment dilution claim must demonstrate that the challenged practice was adopted or maintained for a discriminatory purpose. The Supreme Court further concluded that the trial court and the fifth circuit had applied an incorrect standard in determining that the at-large election procedures were violative of the Constitution. Although *Bolden* is a plurality opinion, it appears that six of the justices agree that discriminatory purpose (intent) is a necessary element of a plaintiff's claim of dilution. Additionally, the Court indicated that proof of intent must be substantially more direct than the proof offered in the original *Brown* case.

The trial court, upon remand, received additional evidence, held further hearings and issued a subsequent order in accordance with the new standard enunciated in *Bolden*.

II. Discriminatory purpose or intent

[1, 2] The plurality opinion issued by the Supreme Court in *Bolden* mandated that a racial vote dilution claimant must prove discriminatory intent. *See also Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). The district court, upon remand, and in light of *Bolden* concluded that the creation and maintenance of the Mobile County at-large election procedures were intentionally discriminatory. *See Rogers v. Lodge*, — U.S. —, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973). Appellant Board contends that the evidence was insufficient to support a finding of discriminatory intent. Our standard of review is to determine whether the trial court's findings are clearly erroneous. *Dowdell v. City of Apopka*, 698 F.2d 1181 (11th Cir.1983); *McMillan v. Escambia County*, 688 F.2d 960 (5th Cir.1982). After carefully reviewing the record, we conclude the trial court's findings are not clearly erroneous.[3]

Initially, it is argued that the 1852 enactment providing for at-large election procedures was not passed with a discriminatory intent. We agree. At that point in time there was no motive to dilute or injure the black vote because blacks were not permitted by law to vote.

In 1870, when new legislation was passed, blacks were permitted, for the first time, to vote in the school board commissioners election. The statute regulating voting procedure allowed a voter to cast only nine ballots for twelve commissioners. Appellees presented historical evidence demonstrating

3. Plaintiffs/Appellees urge this court to affirm the district court's holding based solely upon the 1982 amendment to Section 2 of the Voting Rights Act, enacted after the Supreme Court's decision in *Bolden*. In view of our resolution of the issue of intent, we do not reach that question.

that the purpose of this voting procedure was to secure black representation on the Board.

In 1876, the Alabama legislature repealed the 1870 enactment, substituting the 1852 at-large election procedure which, in essence, removed any possibility of minority representation on the Board. Appellant contends that the 1876 enactment was merely a return to the 1852, original, arrangement and was, therefore, not passed with a discriminatory intent. This is evidenced by the fact that the 1870 act had not provided for single member districts. It is accurate that single member districts were not created by the 1870 enactment. However, the effect of allowing voters to cast nine out of twelve ballots was effective in securing minority representation. Single-member districting is not the only way to achieve this goal. The primary distinction between the 1870 and 1876 enactments is that the former deliberately and explicitly provided for minority representation, while the latter was created by a legislature whose primary goal was the eradication of the advances made by the reconstruction governments to provide equal rights for blacks.

[3] The Supreme Court has consistently held that at-large election schemes are not *per se* unconstitutional. *See e.g., White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973); *Kilgarlin v. Hill*, 386 U.S. 120, 87 S.Ct. 820, 17 L.Ed.2d 771 (1967). However, the maintenance of a purposefully discriminatory vote-diluting at-large districting scheme comes within the purview of the fourteenth amendment. *See Bolden*, 446 U.S. at 66, 100 S.Ct. at 1499. *United States v. Uvalde Consolidated Independent School District*, 625 F.2d 547, 553 (5th Cir. 1980), *cert. denied*, 451 U.S. 1002, 101 S.Ct. 2341, 68 L.Ed.2d 858 (1981). Although the original enactment of at-large voting procedures prior to 1870 was not rooted in discrimination, the situation created by that enactment made it virtually impossible in later days for blacks to be elected to any position. When the 1876 Alabama legislature met and undertook to cancel black political opportunities created by the 1870 act, the evidence is persuasive that the new enactment was motivated by discriminatory intent. The 1876 act which reenacted the 1852 Act of at-large voting procedures was a convenient method of making the election of a black board member unlikely, even though that same procedure had not, originally, been the product of discriminatory intent. When the Alabama legislature reinstated a law which suited the purpose of discrimination, the law may be said to have been a product of discriminatory intent, notwithstanding the fact that in its earlier enactment, discrimination was not a factor.

(a) Present Effects of Discrimination

[4] The trial court concluded that the evidence in the record demonstrated there still exists present effects of discrimination based on the passage of the 1876 Act.[6] The ultimate findings of the court that:

> The present effects of the at-large system, as a function of its original intent in 1876, is to enhance the discriminatory results of other forms of de jure and de facto discrimination in voting practices and procedures. These other forms of discrimination in turn enhance the present effect of the at-large system, to deny equal access to the political system, . . .

are not clearly erroneous. *Brown*, 542 F.Supp. at 1091. The present effects of the discriminatorily motivated act of 1876 further demonstrate the intent behind the passage and maintenance of that Act.

In conclusion, we find that there was sufficient evidence in the record to support the district court's conclusion that the 1876 Act was discriminatorily intended. We further support the district court's conclusions as to the other issues raised in this case and find the remaining errors assigned by the appellant to be without merit.

We AFFIRM.

6. For a complete review of the district court's findings regarding the present effects of the 1876 act see *Brown*, 542 F.Supp. at 1090-92.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LEILA G. BROWN, et al., Plaintiffs,	)	
UNITED STATES OF AMERICA, Plaintiff-Intervenor,	)	CIVIL ACTION
vs.	)	No. 75-298-P
BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ALABAMA, et al., Defendants.	)	

ORDER DENYING DEFENDANTS' MOTION TO STAY, ET AL.

The plaintiffs have moved this court to enter an order dissolving the stay of the remedial injunction granted on July 22, 1982, contending the order by its terms stayed elections only pending appeal to the Eleventh Circuit Court of Appeals.

Plaintiffs further move that this court, (1) order elections in accord with the court's order of July 22, 1982, (2) pursuant to the order of the United States Court of Appeals for the Fifth Circuit dated October 30, 1980, direct that the election of Ruth Drago as a district commissioner be certified, and (3) direct that Dan C. Alexander's position as the non-voting president of the school board be vacated and that the school board henceforth function as a five-member board pursuant to Alabama law.

The plaintiffs on oral argument requested elections at the time of the presidential primaries in March, 1984 or the general elections in November, 1984.

The plaintiff-intervenor United States seeks elections this year.

The defendants made an oral motion in open court to stay the elections until after final disposition of its appeal to the Supreme Court. The court will consider the oral motion as if it had been made in writing.

LITIGATION HISTORY

This suit was filed in 1975 by black citizens of Mobile County challenging the at-large method of election of the Board of School Commissioners of Mobile County. Trial on the merits was had, and in December, 1976, this court held that the multimember at-large election system unconstitutionally diluted the votes of black citizens. By that time, regularly scheduled 1976 school board elections had been held pursuant to Alabama law, and in November, 1976 Commissioner Berger and Commissioner Bosarge were elected at-large to six-year terms.

A Local Act of Alabama, 1919, p. 73, Section 4 provides for six-year terms of office which shall be staggered. The five member board was divided into three classes, Class 1, Class 2, and Class 3. Classes 1 and 2 would consist of two members and Class 3 would consist of one member. It provided for staggered terms, to-wit: "The members in Class 1 shall hold office until the general election in 1920, and until their successors shall

have been elected and qualified. The term of office of their successors shall be six years. The members in Class 2 shall hold office until the general election in 1922 and until their successors are elected and qualified. The term of office of their successors shall be six years. The member in Class 3 shall hold office until the general election in 1924 and until his successor shall be elected and qualified. The term of office of his successor shall be six years. So in every second year thereafter, at the general election in that year, there shall be elected by the people successors to the members of the Class whose term of office is then expiring."

Accordingly, two commissioners would have been elected in 1978, one in 1980, and two in 1982.

In order to remedy the unconstitutional situation found to be present at that time, this court in late 1976 approved a remedial plan that provided for elections from five single-member districts on a staggered basis, pursuant to the statute, with final implementations scheduled for November, 1982. Under the court-approved plan, predominantly black Districts 3 and 4 were scheduled to hold elections in 1978. In an effort to permit the incumbent at-large elected school board members to serve the full terms for which they were elected, the original remedial order provided that for the two-year period between 1978 and 1980 the school board would consist of six members, as opposed to the traditional five, with one of the senior-most members serving as a non-voting president until the expiration of his term in 1980.

With the election of one commissioner from District 5 in 1980, the board was to revert to five-member composition. The final implementation was to be accomplished in 1982 with the election of two members from Districts 1 and 2.

Motions to stay have been filed by the defendants each election year. In May, 1978, the defendants applied for a stay of the remedial election ordered for that year. On May 31, 1978, this court denied that application upon consideration of the four factors outlined in Belcher v. Birmingham Trust National Bank, 395 F.2d 685 (5th Cir. 1968). On June 2, 1978, a panel of the Fifth Circuit Court of Appeals affirmed this court's decision in a per curiam opinion. On or about July 20, 1978, the Fifth Circuit denied defendants' motion to recall and stay the mandate of the court of appeals pending an appeal to the United States Supreme Court. On August 29, 1978, Justice Lewis Powell as Circuit Justice denied an application for stay pending certiorari.

On October 30, 1978, the Supreme Court noted probable jurisdiction on the merits of this case, Williams v. Brown, 439 U.S. 925 (1978). On October 31, 1978, Justice Powell denied a second application for stay pending appeal. Party primary and general elections were held in 1978 pursuant to the original memorandum order of this court, at which time Commissioners Gilliard and Cox, two blacks, were elected and are serving from Districts 3 and 4, respectively.

In April, 1980, the Supreme Court vacated and remanded this court's original decision of 1976 in the light of City of Mobile v. Bolden, 446 U.S. 55 (1980). Williams v. Brown, 446 U.S. 236 (1980). On remand, hearings were held in this court to resolve whether impending 1980 elections should be held under a single-member district or at-large system. This court fashioned an order of July 25, 1980, which, inter alia, allowed the election of one commissioner from single-member District 5 in 1980 pursuant to the original order, and provided that Board President Alexander would continue in office until the expiration of his term in January, 1981. The defendants appealed this order, and again unsuccessfully sought a stay in this court, in the court of appeals, and in the Supreme Court.

The merits of the defendants' appeal were heard by a three-judge panel of the Fifth Circuit. The court of appeals affirmed that elections from the one single-member district should go forward but modified this court's original order by requiring this court to enter an order holding in abeyance the certification of the election results of the scheduled 1980 election involving Commissioner Drago as a single-member district commissioner, and ordering that Commissioner Drago would continue to serve as an at-large commissioner "pending entry of a final judgment on remand of this case." That court further ordered that Commissioner Alexander would continue in office as the non-voting president "until entry of a final judgment on remand." He continues to serve. An election was held involving District 5

in 1980, at which time Commissioner Drago was elected as a single-member district commissioner, with certification pending.

On remand from the Supreme Court and the Fifth Circuit Court of Appeals of Bolden v. City of Mobile and this case, this court denied a motion summarily to dismiss the complaint and gave the parties the opportunity to present additional evidence.[1]

---

1 After the presentation of additional evidence this court in Bolden and this case, on April 15, 1982, in separate opinions found for the plaintiff class in each case. In Bolden the court found the at-large election of all city commissioners was conceived with racially discriminatory purposes and the present effects of this discriminatory intent continues to the present.

After giving the state legislature an opportunity to correct the unconstitutional form, which it failed to do, this court ordered each party to submit a suggested remedial plan.

A consent remedial plan provided for the election of commissioners from single-member districts without designated departmental duties. It further provided for a city administrator to be appointed by the commissioners to be responsible for these duties. Following a notice to the class members and a hearing, the consent remedial plan was approved by the court (the plan is a three single-member district commission plan [council] with a city administrator [manager], i.e., a modified council-city manager form).

Evidentiary hearings were conducted at the conclusion of which the court permitted the parties to submit post-hearing proposed findings of fact and conclusions of law. On April 15, 1982, this court entered an Opinion and Order, finding the at-large system was conceived with a racially discriminatory and invidious purpose and that it was being maintained by the defendants with that intent. Brown v. Board of School Commissioners, 542 F.Supp. 1078 (S.D. Ala. 1982).

The defendants asked this court to stay the 1982 elections and continue the incumbent office holders in office beyond their normal election terms, pending appeal to the United States Court of Appeals, Eleventh Circuit. This court considered the request in the light of Belcher v. Birmingham Trust National Bank, 395 F.2d 695 (5th Cir. 1968), and granted a stay "during the pendency of the appeal of this case to the United States Court of Appeals for the Eleventh Circuit."

THE 1982 STAY: FINDINGS AND CONCLUSIONS

In its Order Granting Stay of July 22, 1982, 2:10 p.m., this court noted that Belcher outlined four judicial factors to be considered in determining whether to grant "the extraordinary remedy of stay pending appeal." The court balanced the four Belcher factors before ordering a stay. The court found that (1) there would not be irreparable harm to the applicants [defendants] (emphasis added) in refusing stay; (2) there would be no substantial harm to the non-movants by the issuance of a stay; (3) there would be no substantial harm to the public interest by the issuance of a stay; and (4) that the defendants were unlikely (emphasis added) to prevail on the merits of their appeal. Based upon these findings and conclusions, the court granted the requested stay.

On May 31, 1983, the plaintiffs filed a motion to dissolve the July 22, 1982 stay. On June 6, 1983, a three-judge panel of the United States Court of Appeals for the Eleventh Circuit affirmed this court's April 15, 1982 Opinion and Order on

remand, finding that this court's finding regarding discriminatory purpose under the proper standard of review were not clearly erroneous.

> "The present effects of the discriminatorily motivated act of 1876 further demonstrate the intent behind the passage and maintenance of that Act.
>
> "[W]e find that there was sufficient evidence in the record to support the district court's ...conclusions as to the other issues raised in this case...."

Brown v. Board of School Commissioners, 706 F.2d 1103, 1107 (11th Cir. 1983).

FINDINGS OF FACT

The three-judge court considering the Alabama legislative reapportionment case has entered an order requiring new legislative elections before the end of 1983. Burton v. Hobbie, No. 81-617-N (M.D. Ala. Apr. 11, 1983)(three-judge court)(copy attached hereto as Appendix A). At the hearing held regarding the plaintiffs' present application, this court was informed that a special election was called by Governor George C. Wallace to be held on September 27, 1983, in compliance with that Burton order. Subsequently, a judge of the Middle District of Alabama ordered in a companion case that Governor Wallace "set a date for a general election in 1983 that will allow either political party to have a primary if it so chooses." That date was conditioned on the decision of either political party to have a primary.

Governo. Wallace set November 8, '83 as the date for a special election of a reapportioned Alabama Legislature in the event either party chose to hold primary elections. The Republican Party of Alabama had previously indicated they would hold a primary election if given a chance (Mobile Register, July 29, 1983, at 1), thus fixing the date for the special legislative election as November 8, 1983.

Ala. Code 1975 § 17-16-5 provides "Primary elections are not compulsory. A political party may, by its state executive committee, elect whether it will come under the primary election law...[which is presumed] but may signify its election not to...at least 60 days before...general primary election...declining...primary...."

Ala. Code 1975 § 17-16-11(a) provides "All candidates...shall file their declaration...46 days before...primary."

With respect to two of the four Belcher factors considered in this court's Order Granting Stay of July 22, 1982, (1) no new developments have been brought to the court's attention that would show irreparable harm to the defendants if the stay were not extended.

This court's order on remand does not envision a fundamental change in the functions of the school board.

(2) In the light of recent affirmance of this court's order on remand by the Eleventh Circuit Court of Appeals, it is even less likely that the defendants will prevail on the merits.

In the event this court's order on remand were reversed by the Supreme Court, there would be no significant obstacle to returning to an at-large scheme. The number of commissioners, the staggered terms, the length of terms, nor structure of functions have been changed by ordering single-member district elections rather than at-large elections.

A reconsideration of two of the other four Belcher factors are appropriate. (1) No facts have been brought to the court's attention that would tend to show any substantial harm to the plaintiffs' class, blacks, in the event the stay were continued.

However, the plaintiff-intervenor, United States, represents all citizens, black, white and others. For them there is the factor of continuance in office by at-large elected commissioners who will have served beyond their terms, three years for one and one year for two, by January, 1984. This means there are three members elected from single-member districts serving unexpired terms and the remaining members serving expired terms. This constitutes a deprivation to persons in Districts 1 and 2, in that these districts have not elected commissioners who will represent their particularized district needs. The persons in these two districts are entitled to elected commissioners from their districts rather than representation by at-large commissioners who are serving beyond their expired terms. These persons in these two districts will suffer substantial harm by the granting of another stay.

(2) A reconsideration of the fo..th Belcher factor, the public interest, is warranted in the light of developments over the past year since the court stayed its order on remand.

Evidence was offered that there is a feeling of unsettledness among the citizens of Mobile County as a result of the school board as heretofore outlined, and that there is a consensual feeling that an election this year with some lead-time to encourage candidates to seek office would be desirable. The evidence offered was that as a practical matter general elections in November would provide sufficient lead-time. The facts set out with reference to the third factor above, that is, commissioners serving beyond their elected terms and the people not having had an opportunity to elect persons from their districts to serve their particularized needs, are matters of considerable public interest and concern. This court is desirous of not changing the statutory patterns of elections any more than is absolutely necessary to correct the problems enunciated in its April, 1982 order. In particular, the court has reference to staggered terms of six years each. If elections are delayed until 1984, in order to preserve the staggered terms it would be necessary to shorten two six-year terms by as much as two years if elections were ordered in November, 1984, and for four years, four would be elected and serving concurrently rather than two by carryover. By proceeding with elections at this time it will only be necessary to shorten the terms of two commissioners by one year.

The opportunity to hold school board elections in conjunction with the impending legislative elections presents the opportunity to save taxpayers a considerable sum of money over the costs of a special school board election. Joe McEarchern, Chief Clerk of the Probate Court for Mobile County, testified and stated in affidavit submitted with the petition that county-wide special elections for the office of Board of School Commissioners of Mobile County would cost approximately $100,000 for each election. He further stated that the total cost, if the traditional primary, primary run-off and general election were held, would be approximately $300,000. McEarchern testified at hearing that the cost of including a school board election with the special legislative election would involve only the costs of adding names to the ballots, which would be minimal.

Mr. McEarchern further testified that 21 days lead-time would be needed in order to procure supplies necessary to the holding of a primary election.

This court's original order of 1976 intended that the six-member board remedial scheme last only two years so the elected members could serve out their elected terms. It has now been five years. Three of the six incumbent school commissioners have served beyond their normal six-year terms. Commissioners Berger and Bosarge were elected at-large in 1976 to six-year terms, but continue to serve beyond the expiration of their term of office in 1982. Commissioner Alexander was elected at-large and has served almost three years beyond his term of office.

Commissioner Drago's at-large term of office expired in 1980. She was re-elected in 1980 from a single-member district pursuant to this court's original order. Commissioner Drago is serving but awaiting certification by this court.

The court finds that since its order of July 22, 1983 granting a stay of the court's order on remand circumstances have changed such that it would be better to have elections in conjunction with the scheduled special legislative election than to extend the stay and not hold elections.

CONCLUSIONS OF LAW

Plaintiffs move the court to immediately dissolve the stay of elections entered July 22, 1982. The court's order granted a stay "during the pendency of the appeal of this case to the United States Court of Appeals for the Eleventh Circuit." On June 6, 1983, the Eleventh Circuit affirmed this court's order of July 22, 1983 finding purposeful dilution. Thus, according to its terms, the stay was automatically lifted upon the issuance of the Eleventh Circuit panel opinion affirming this court on the merits. See Brown v. Board of School Commissioners, 706 F.2d 1103 (11th Cir. June 6, 1983).

The defendants have moved the court to again stay elections. The court again turns to the Belcher factors in determining whether to grant "the extraordinary remedy of stay pending appeal." 395 F.2d at 685. The burden is upon the defendants. The four Belcher factors are to be balanced when determining the propriety of a stay. Long v. Robinson, 432 F.2d

977, 981 (4th Cir. 1970), cited with approval in Beverly v. United States, 468 F.2d 732, 741 n. 13 (5th Cir. 1972).

(1) Harm in Refusing the Stay

The defendants claim that substantial confusion and resulting harm in the operation of the Mobile County School Board will result if an election is held for single-member district school commissioners in 1983, and this court is reversed. The plaintiffs contend that the stay of regularly conducted elections continues to harm the public by failing to maintain acccountability.

Little has changed with respect to this factor in the intervening year, except that certain incumbent commissioners continue to hold office beyond their elected terms. The court reaffirms its conclusion that there would not be irreparable harm in refusing the stay. See Brown v. Board of School Commissioners, No. 75-298 (S.D. Ala. July 22, 1983, 2:10 p.m.) at 8.

(2) Harm in Granting Stay

The second factor for consideration is whether a stay of injunction would result in substantial harm to the non-movants. As was the case in July, 1982, two of the school board commissioners are black, representing single-member districts created by this court's previous order of 1976. Both were elected in 1978 and have served on the board since that time. A stay would not threaten the positions of the two black commissioners, who are responsive to issues critical to black

interests. There is no substantial harm to the plaintiff class by the issuance of a stay.

However, there would be substantial harm in the granting of another stay to those represented by the plaintiff-intervenor, United States. These persons in Districts 1 and 2 are now being represented by at-large elected commissioners who will have served by January, 1984 one year beyond their elected terms. These persons are deprived of not having elected commissioners who will represent their particularized needs. These persons are entitled to have elected commissioners from their districts.

(3) Likelihood of Success on Appeal

Since this court's order of April 15, 1982, 542 F.Supp. 1078 and its subsequent order granting a stay on elections, significant events have occurred which make it unlikely that the defendants would prevail on appeal, namely, (1) this court's order on remand has been upheld by the court of appeals. This court on remand faithfully followed the guidelines set out by the Supreme Court in Bolden. The evidence on remand concerning the intended purpose behind the at-large election system is clearly in favor of the plaintiffs and met the legal standards applied by at least eight of the nine justices' views as expressed in Bolden. In its April 15, 1982 order, this court found the at-large system was conceived with racially discriminatory purposes and that it was being maintained by defendants with that intent. (2) The six-judge majority in Rogers v. Lodge, -U.S.-, 73 L.Ed.2d

1012 (1982), stated that the plaintiff may prevail on a constitutional claim of racial vote dilution by a showing that a system was operated for a racially discriminatory purpose. The court placed heavy reliance upon the findings of fact made by the district court and relied upon its recent decision in Pullman-Standard v. Swint, __U.S.__ (1982). In Rogers the court stated that to prevail on a constitutional claim of racial vote dilution the plaintiff must prove that the challenged system was created or operated for racially discriminatory purposes. This court found both of these factors present in this case.

Additionally, Congress has extended Section 2 of the Voting Rights Act to provide for a "result test".

The court finds that the defendants are unlikely to prevail on the merits of the appeal.

(4) Public Interest

This court held in its July 22, 1982 order that a stay would not result in substantial harm to the public interest. The court noted that "[s]ome confusion would result if this court were reversed on appeal. A return to an at-large electoral system would undoubtedly be delayed for several months." Id. at 10.

The court has found there is a feeling of unsettledness as a result of the existing school board situation. The court has noted under "Harm in Granting Stay" that persons in Districts 1 and 2 are being deprived of having school commissioners elected from their districts and instead are being represented by

at-large commissioners whose terms have expired. The court also noted that in preserving the staggered elections of office as provided by statute, if elections are held this year two six-year terms would be shortened by only one year but if held in 1984 these terms would have to be shortened two years and for that period of time the staggered feature would have been destroyed. None of the functions of the board have been changed, only the manner of electing its members. Due to the changed conditions which have come about since this court's order of July 22, 1982, the confusion that the court noted has been considerably diminished. The delay previously noted in returning to an at-large system, at this time would not be any longer than the delay since this court's April, 1982 order. Considering these conditions as described herein, the court now finds there would be considerable harm to the public interest by the granting of another stay.

Having balanced the four factors noted above, the court concludes that a stay pending appeal is unwarranted and is hereby DENIED.

The court will, by a separate order, rule on the certification of Commissioner Drago as elected from District 5, and the status of non-voting board president Dan Alexander.

The court will avail itself of the opportunity to order an election this year by utilizing two of the three dates which will be used in the special election for the state legislature.

The first primary date of September 6, 1983 for the special legislative election comes too soon for persons to consider and offer themselves as candidates and prepare a race for the two places to be elected to the school board. The legislators and the public have known for several weeks that there would be a special election in September, 1983 for their places. This order is the first notice the public will have had of the election of the school board members. The court will utilize the September 27, 1983 date for the primary and set a run-off election three weeks thereafter, October 18, 1983, with the general election to coincide with the general election of the special legislative election November 8, 1983. This will utilize two of the three dates to be used in the election of the legislature and will save the taxpayers of this county a considerable amount of money.

Ala. Code Chapter 16 "Primary Elections", § 17-16-1 et seq. (1975) sets out the law of Alabama with reference to primary elections. This court has no authority to require a primary election but the question of whether a political party will have a primary is directed to the judgment of the political party. By statute a political party as defined by Alabama law is entitled to a primary in a general election unless it signifies its intent not to have a primary. Ala. Code § 17-16-5 (1975). Burton v. Hobbie, No. 81-617-N (M.D. Ala. July 27, 1983)(Memorandum Opinion and Order)(three-judge court), Bogard v. Hobbie, No. 83-H-604-N (M.D. Ala. July 27, 1983)(Memorandum Opinion). It will also be

necessary to shorten the qualifying period as provided by the primary laws. Pursuant to FRCP 19, the court ex mero motu names as party defendants the State Democratic Executive Committee of Alabama and the Alabama Republican Executive Committee in order that they may have notice and make objections, if any, to the orders of this court.

From the records of this court it appears that the Probate Judge, the Circuit Court Clerk, and the Sheriff of Mobile County are parties; however, there has been a successor in the office of Probate Judge. Probate Judge L. W. Noonan as successor is named as a party defendant. Maurice Castle is still Circuit Court Clerk of Mobile County, and Tom Purvis is still Sheriff of Mobile County. In the event they are no longer parties, the court ex mero motu names them as party defendants and the Clerk of this court is ordered to see that service is perfected on each of the above named defendants. Julian D. Butler, as counsel, has advised the court that he will accept service for the State Democratic Executive Committee of Alabama, and Perry O. Hooper, Sr., as counsel, will accept service for the Alabama Republican Executive Committee.

For the added parties time for pleading or objections to this order is shortened to five days after service because of the urgency surrounding the elections herein ordered.

The defendants State Democratic Executive Committee of Alabama and Alabama Republican Executive Committee may elect to have a primary if either so chooses. The primary dates

hereinafter set out are conditioned on either political party's decision to have a primary. If both defendants State Democratic Executive Committee of Alabama and Alabama Republican Executive Committee notify Secretary of State Siegelman within fifteen (15) days from the date of this order that they do not wish to have a primary, there will not be a primary.

It is hereby ORDERED, ADJUDGED and DECREED that there be a special election November 8, 1983 for school board districts 1 and 2[2] as set out in this court's order dated July 22, 1982, as

---

2 Bosarge, who is now serving beyond his elected term as an at-large commissioner, resides in District 1. } AMEND OUT

Berger, who is now serving beyond his elected term as an at-large commissioner, resides in District 2.

After this election and the certification of Commissioner Drago as District 5 commissioner, all five members will have been elected from single-member districts.

---

last amended.

In the event either the State Democratic Executive Committee of Alabama or the Alabama Republican Executive Committee does not notify Secretary of State Siegelman within fifteen (15) days from the date of this order that it does not wish to have a primary, a primary will be held September 27, 1983, and if a run-off is necessary pursuant to Ala. Code § 17-16-36 (1975) it will be held on October 18, 1983, with the general election following on November 8, 1983, as above set out.

It is hereby ORDERED qualifying for the school board election will be permitted up to and including 5:00 p.m. Central Daylight Time, August 31, 1983.

DONE . Mobile, Alabama, this t) 7th day of August, 1983.

SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

FILED

APR 11 1983

CLERK
U.S. DIST. COURT
MIDDLE DIST. OF ALA.
DY CLERK, BY

WILLIAM L. BURTON, ETC., ET AL.,

Plaintiffs,

v.

WALKER HOBBIE, JR., ETC., ET AL.,

Defendants,

CHARLES A. GRADDICK, Attorney General for the State of Alabama,

Defendant-Intervenor.

CIVIL ACTION NO. 81-617-N

Before JOHNSON, Circuit Judge, HOBBS and THOMPSON, District Judges.

BY THE COURT:

O R D E R

In accordance with the opinion of this Court made and entered this date, it is ordered that:

1. Alabama Legislative Act 83-154, dated February 17, 1983, and precleared by the Attorney General of the United States on February 28, 1983, is hereby APPROVED.

2. Said Act 83-154 will be implemented by elections which shall be conducted pursuant to said Act this fall.

3. The present members of the Alabama Legislature elected pursuant to Act No. 82-629 shall serve out their one-year terms of office pursuant to Act No. 82-629.

APPENDIX "A"

4. The terms of office of all presen members of the Alabama Legislature, both House and Senate, shall expire at midnight December 31, 1983.

5. Said elections shall be conducted pursuant to Act No. 83-154 in all districts, both House and Senate, of the state.

DONE this the 11th day of April, 1983.

UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LEILA G. BROWN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	CIVIL ACTION
Plaintiff-Intervenor,	)	
	)	No. 75-298-P
vs.	)	
	)	
BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ALABAMA, et al.,	)	
	)	
Defendants.	)	

AMENDMENT TO AUGUST 3, 1983 ORDER DENYING DEFENDANTS' MOTION TO STAY, ET AL.

The order of this court dated August 3, 1983 is amended by deleting on Page 20 the next to the last paragraph beginning "In the event..." and ending "November 8, 1983, as above set out", and in lieu thereof the following is substituted:

On August 3, 1983, subsequent to the filing of the court's order and judgment, the court was advised by Joe McEarchern, Chief Clerk of the Probate Court for Mobile County, Alabama, that because the elections ordered by this court are countywide elections, rather than state elections, determination of whether or not to hold primary elections customarily would be made by the Mobile County Democratic Executive Committee and the Mobile County Republican Executive Committee.

APPENDIX C

The court finds that the Mobile County Democratic and Republican Executive Committees should be added as parties to facilitate effectuation of this court's order, see Fed. R. Civ. P. 19. The court ex mero motu joins the county executive committees as parties to this litigation.

Therefore, it is ORDERED, ADJUDGED and DECREED that the Mobile County Democratic Executive Committee and the Mobile County Republican Executive Committee are named as party defendants, and the Clerk of this court is ordered to see that service is perfected on each of the above named defendants.

In the event the State Democratic Executive Committee of Alabama or the Mobile County Democratic Executive Committee, or the Alabama Republican Executive Committee or Mobile County Republican Executive Committee, whichever respective Democratic or Republican committee is proper under the primary laws of Alabama and its own laws, does not notify Secretary of State Siegelman and Mobile County Probate Judge Noonan within fifteen (15) days from August 3, 1983 that it does not wish to have a primary, a primary will be held September 27, 1983 and if a run-off is necessary pursuant to Ala. Code 17-16-36 (1975) it will be held on October 18, 1983, with the general election following on November 8, 1983, as set out above. If both the said Democratic and Republican Committees elect not to have a primary, only the general election will be held.

The added county committees have five (5) days from service of this order to plead or object to it.

DONE at Mobile, Alabama, this the 12 day of August, 1983.

Virgil Pittman
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LEILA G. BROWN, et al., Plaintiffs, UNITED STATES OF AMERICA, Plaintiff-Intervenor, vs. BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ALABAMA, et al., Defendants.	)	CIVIL ACTION No. 75-298-P

ORDER AMENDING FOOTNOTE 2 IN ORDER DENYING DEFENDANTS' MOTION TO STAY, ET AL., DATED AUGUST 3, 1983

Footnote 2 on page 20 of this court's Order Denying Defendants' Motion to Stay, et al., dated August 3, 1983, is hereby amended by deleting the first paragraph and substituting in lieu thereof:

The at-large place that Bosarge now occupies, and will have occupied for one year beyond his elected term in January, 1984, will no longer exist.

DONE at Mobile, Alabama, this the 9th day of August, 1983.

SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LEILA G. BROWN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	CIVIL ACTION
Plaintiff-Intervenor,	)	
	)	No. 75-298-P
vs.	)	
	)	
BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ALABAMA, et al.,	)	
	)	
Defendants.	)	

AMENDMENT TO THIS COURT'S ORDER DATED AUGUST 3, 1983

The attorneys for all the parties agreed that the court could confer ex parte with the Probate Judge of Mobile County, Alabama concerning problems he may have in setting up the election machinery.

Following this agreed ex parte conference, the Probate Judge has advised the court that the Code of Alabama § 17-7-1(a)(3)(Supp. 1982)(1975) provides that independent candidates file their notice 60 days prior to the primary. He has further advised the court that the Secretary of State has shortened this time for the legislative races in the State of Alabama this fall pursuant to a three-judge panel and a single judge case in the Middle District of Alabama to September 6, 1983.

In order to give possible independent candidates sufficient time to qualify it is necessary to shorten the qualifying time.

To minimize confusion, this court hereby shortens the time for the qualifying of independents for the single-member school districts 1 and 2 ordered by this court to September 6, 1983, 5:00 p.m. Central Daylight Time.

DONE at Mobile, Alabama, this the 9th day of August, 1983.

SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LEILA G. BROWN, et al., Plaintiffs,	)	
UNITED STATES OF AMERICA, Plaintiff-Intervenor,	)	CIVIL ACTION No. 75-298-P
vs.	)	
BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ALABAMA, et al., Defendants.	)	

JUDGMENT

In accordance with the attached Order Denying Defendants' Motion to Stay, et al., it is ORDERED, ADJUDGED and DECREED that there will be a special general election November 8, 1983 for single-member District 1 and single-member District 2 of the Mobile County Board of School Commissioners as set out in this court's July 22, 1982 order, as last amended. A primary will be held for these elections September 27, 1983 and a run-off, if necessary, October 18, 1983. The primary dates are conditioned on either political parties' decision to have a primary. If both defendants State Democratic Executive Committee of Alabama and Alabama Republican Executive Committee notify Secretary of State Siegelman within fifteen (15) days from the date of this order that they do not wish to have a primary, the

primary will not be held and only the special general election will be held November 8, 1983.

In the event primaries are held, the period for qualifying is set prior to 5:00 p.m. Central Daylight Time, August 31, 1983.

The plaintiffs, plaintiff-intervenor United States, and defendant Mobile County Board of School Commissioners are to bear their own costs.

DONE at Mobile, Alabama, this the 3rd day of August, 1983.

SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LEILA G. BROWN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	CIVIL ACTION
Plaintiff-Intervenor,	)	
	)	No. 75-298-P
vs.	)	
	)	
BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ALABAMA, et al.,	)	
	)	
Defendants.	)	

AMENDMENT TO JUDGMENT

The Judgment in this cause entered August 3, 1983 is amended by deleting the following, on Page 1, beginning on the fourth line from the bottom "If both defendants..." and ending on Page 2, the second line "November 8, 1983", and in lieu thereof the following is substituted:

In the event the State Democratic Executive Committee of Alabama or the Mobile County Democratic Executive Committee, or the Alabama Republican Executive Committee or Mobile County Republican Executive Committee, whichever respective Democratic or Republican committee is proper under the primary laws of Alabama and its own laws, does not notify Secretary of State Siegelman and Mobile County Probate Judge Noonan within fifteen (15) days from August 3, 1983 that it does not wish to have a primary, a primary will be held September 27, 1983 and if a

run-off is necessary pursuant to Ala. Code 17-16-36 (1975) it will be held on October 18, 1983, with the general election following on November 8, 1983. If both the said Democratic and Republican Committees elect not to have a primary, only the general election will be held.

DONE at Mobile, Alabama, this the 9th day of August, 1983.

Virgil Pittman
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LEILA G. BROWN, et al., Plaintiffs,	)	
UNITED STATES OF AMERICA, Plaintiff-Intervenor,	)	CIVIL ACTION No. 75-298-P
vs.	)	
BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ALABAMA, et al., Defendants.	)	

ORDER ON MOTION FOR RECONSIDERATION

After a hearing and consideration of the defendants' motion for this court to reconsider its Judgment and Order entered on August 3, 1983, the motion is hereby DENIED.

The issues raised are the same as those issues which were presented to the court on the defendants' Motion to Stay, save and except the contention that when the elections are completed approximately 71,000 persons (including voters and non-voters, such as minors, not registered, etc.) will not have cast a vote in any of the five districts as presently aligned in the 1980 order. This comes about because two of the commissioners were elected pursuant to the 1970 census and the third commissioner, Mrs. Drago, was elected to a district pursuant to the 1980 census.

If the court stays the election, there will be approximately 145,000 persons (including voters and non-voters) who will be served by at-large members serving one year beyond their elected terms.

It appears from representations made in open court that granting a stay would deny the needs of 145,000 persons. A denial of the stay would deny the needs of less than one-half that many, to-wit: 71,000 persons. It appears more equitable to deny the stay.

DONE at Mobile, Alabama, this the 8th day of August, 1983.

SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 83-7459

LEILA G. BROWN, et al.,

Plaintiffs-Appellees,

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

versus

BOARD OF SCHOOL COMMISSIONERS
OF MOBILE COUNTY, ALABAMA,
et al.,

Defendants-Appellants.

- - - - - - - - - - - - -

Appeal from the United States District Court for the
Southern District of Alabama

- - - - - - - - - - - - -

Before FAY, KRAVITCH and CLARK, Circuit Judges

B Y T H E C O U R T :

The Motion of appellant (s) for stay pending appeal is DENIED.

APPENDIX I

MOT-6B

STATE OF ALABAMA)

COUNTY OF MOBILE)

AFFIDAVIT OF JOE McEARCHERN

Personally appeared before me the undersigned notary public in and for said state and county, Joe McEarchern, who after being by me first duly sworn, on oath deposes and says as follows:

1. My name is Joe McEarchern. I am the Chief Clerk of the Probate Court of Mobile County, Alabama and I have direct supervisory authority and responsibility concerning the conduct of elections in Mobile County.

2. I am making this affidavit at the request of counsel for the defendants in connection with the motion for stay to be filed by the defendants in the U. S. Supreme Court in the case of Board of School Commissioners of Mobile County, Alabama, et al., vs. Leila G. Brown, et al. and United States of America. The information stated hereinafter was obtained from the records on file in the Probate Court of Mobile County, Alabama and/or made known to the Court.

3. Ruth F. Drago was elected as the single-member district commissioner for Mobile County School Board District 5 in November of 1980 as that district was delineated in the District Court's order of December 1976. At that time and up to the present day, it appears that she resides at 208 Grand Boulevard, Mobile, Alabama.

4. According to the School Board District maps on file in this office and as last adopted by the district court, Drago's residence is now located in single-member District 4.

5. Norman G. Cox was elected to the school board for a six year term in November 1978 pursuant to the district court's 1976 order. Cox was elected from single-member District 4 where he resided at 1664 Government Street, Mobile, Alabama. It appears that he continues to reside at that address. Although the boundaries of District 4 were changed by the 1982 remedial order, Cox still resides in that district which now includes Ruth Drago's residence on Grand Boulevard.

6. A number of people, which appears to be substantial, living in District 5 as defined in the 1976 order have now been placed in District 2 as that district is delineated in the 1982 remedial order. The electors within this group of people will have the opportunity to vote in two single-member district school board elections within the past three years, while the majority of voters living in the new District 5, defined in the 1982 remedial order, will not have voted in a school board election since the 1976 at-large elections.

7. It appears that the majority of people living in the new District 5, as defined in the 1982 remedial order, were living in old District 2, delineated in 1976 order.

8. It appears that approximately 72,311 persons living in single-member District 5 will not have a districted school board

commissioner after elections are held on November 8, 1983. Elections are only scheduled for Districts 1 and 2.

Joe McEarchern
Chief Clerk, Probate Court

Subscribed and sworn to before me on this the 13th day of September, 1983.

Notary Public, State of Alabama-at-Large

LAW OFFICES
RHYNE & RANKIN
SUITE 800
1000 CONNECTICUT AVENUE, N. W.
WASHINGTON, D. C. 20036

202 466-8420

CABLE ADDRESS
CHASRHYNE

September 15, 1983

Alexander L. Stevas, Clerk
Supreme Court of the United States
1 First Street, N. E.
Washington, D. C. 20543

A-182

Re: Board of School Commissioners of Mobile County, Alabama, et al. v. Leila G. Brown, et al., United States of America, No. 83-334

Dear Mr. Stevas:

Yesterday, appellants in the above referenced action filed an Application for Stay of Enforcement of Judgment. On pages 7, 12, 13 and 19 appellants inadvertently referred to appellees as "respondents", on page 6 appellants inadvertenly referred to appellants as "applicants", and on page 15, line 6 of footnote 11, appellants inadvertenly referred to "Districts 3 and 4" instead of "Districts 1 and 2." Enclosed herewith are an original and two copies of those pages, as corrected, and page 16, on which a comma was omitted from line 4 of footnote 14. Also, enclosed is a corrected copy of the entire Application, including the appendices and the affidavit. A copy of the aforementioned pages is being sent to the persons listed on the Certificate of Service in the manner described thereon.

Sincerely,

Charles S. Rhyne

Charles S. Rhyne
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CSR:mm

Enclosures

cc: All Counsel

5) Appellants appealed the district court's decision to the United States Court of Appeals for the Fifth Circuit;

6) On May 19, 1978, appellants sought from the district court a stay of the elections scheduled for that year, and on May 31, 1978, the court denied appellants' motion, Brown v. Moore, Civ. Act. No. 75-298-P (S.D. Ala. May 31, 1978) (Order Denying Defendants' Motion for a Stay);

7) On June 2, 1978, the Fifth Circuit affirmed the district court's decision on the merits, Brown v. Moore, 575 F. 2d 298 (5th Cir. 1978), and on July 20, 1978, denied appellants' motion for stay and recall of the mandate pending appeal to the Supreme Court, Brown v. Moore, No. 77-1583 (5th Cir. July 20, 1978) (Order);

8) Appellants appealed the Fifth Circuit's decision on the merits [2] and on October 26, 1978, sought a stay pending that appeal;

9) On October 30, 1978, the Supreme Court noted probable jurisdiction over the appeal of the Fifth Circuit's decision on the merits, Williams v. Brown, 439 U.S. 925 (1978);

10) On October 31, 1978, Justice Powell denied the application for a stay pending appeal, [3] Moore v. Brown,

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[2] On October 16, 1978, appellants sought from the district court a stay of elections which, on October 20, 1978, that court denied, Brown v. Moore, Civ. Act. No. 75-298-P (S.D. Ala. Oct. 1978) (Order).

[3] Justice Powell originally had granted a stay. Moore v. Brown No. A-386 (U.S. Oct. 27, 1978) (Powell, Circuit Justice).

No. A-386 (No. 78-357) (U.S. Oct. 31, 1978) (Order) (Powell, Circuit Justice);

11) Accordingly, elections for single-member Districts 3 and 4 were held in 1978, and two blacks were elected (Commissioners Gilliard and Cox), and at present are serving, from those districts, Brown v. Board of Commissioners of Mobile County, Alabama, Civ. Act. No. 75-298-P, typescript op. at 4 (S.D. Ala. Aug. 3, 1983) (Order Denying Defendants' Motion To Stay, et al.);

12) In light of the Court's decision in City of Mobile, Alabama v. Bolden, 446 U.S. 55 (1980), on April 22, 1980, the Court vacated the Fifth Circuit's decision on the merits and remanded the case to that court for further proceedings consistent with the decision in Bolden, Williams v. Brown, 446 U.S. 236 (1980);

13) The Fifth Circuit, in turn, remanded the case to the district court, and appellees moved that court for a preliminary injunction seeking to preserve the status quo pending a decision on remand;

14) On July 25, 1980, the district court entered an Order on Motion for a Preliminary Injunction Preserving Status Quo Pending Final Judgment on Remand ("Injunctive Order"), Brown v. Moore, Civ. Act. No. 75-298-P (S.D. Ala. July 25, 1980), providing in part that

a) Commissioners Gillard and Cox, elected in 1978 from single-member Districts 3 and 4, were to continue serving on the School Board, id. at 7,

26) Also on July 22, 1982, the court entered an Order Adopting the Proposed Redistricting Plan Submitted by the United States of America, Brown v. Board of School Commissioners of Mobile County, Alabama, Civ. Act. No. 75-298-P (S.D. Ala. July 22, 1982), adopting the reapportionment plan, based on the 1980 census, the United States, as plaintiff-intervenor, had submitted; 6/

27) On May 26, 1983, appellees moved to dissolve the stay of elections, and on June 6, 1983, the Eleventh Circuit issued its decision affirming the district court's decision on the merits, Brown v. Board of School Commissioners of Mobile County, Alabama, 706 F.2d 1103 (11th Cir. 1983); 7/

28) Appellants moved the district court to continue the stay of elections pending their appeal of the Eleventh Circuit's decision to the Supreme Court;

29) On August 3, 1983, the district court entered an Order Denying Defendants' Motion To Stay, et al., Brown v. Board of School Commissioners of Mobile County,

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6/ Subsequently, the court somewhat modified the reapportionment plan. Brown v. Board of School Comm'rs of Mobile County, Ala., Civ. Act. No. 75-298-P (S.D. Ala. Aug. 8, 1983) (Order on Plaintiffs' Motion for Modification of Districts).

7/ Because it concluded that the district court's finding of intent was not clearly erroneous, the Eleventh Circuit did not reach the question whether the district court's decision could be affirmed under amended section 2 of the Voting Rights Act of 1965, 42 U.S.C.A. §1973 (West Supp. 1983). Brown, 706 F.2d at 1106 n.5.

Alabama, Civ. Act. No. 75-298-P (S.D. Ala. Aug. 3, 1983), [8] and a Judgment, Brown v. Board of School Commissioners of Mobile County, Alabama, Civ. Act. No. 75-298-P (S.D. Ala. Aug. 3. 1983), [9] ordering a special election for the School Board to be held on November 8, 1983, to elect elect commissioners from single-member Districts 1 and 2, as apportioned in the court's July 15, 1982 order, as amended, and providing for party primaries to be held, if desired by the (political) parties on September 27, 1983, and, if a run-off is necessary, on October 18, 1983;

30) On August 5, 1983, appellants moved the court for reconsideration of its August 3, 1983 Order and Judgment, [10] which on August 8, 1983, the court denied, Brown v. Board

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[8] The court amended the order on August 4, 1983, Brown v. Board of School Comm'rs of Mobile County, Ala., Civ. Act. No. 75-298-P (S.D. Ala. Aug. 4, 1983) (Amendment to August 3, 1983 Order Denying Defendants' Motion To Stay, et al.), August 8, 1983, Brown v. Board of School Comm'rs of Mobile County, Ala. (S.D. Ala. Aug. 8, 1983) (Order Amending Footnote 2 in Order Denying Defendants' Motion To Stay, et al., Dated August 3, 1983), and August 9, 1983, Brown v. Board of School Comm'rs of Mobile County, Ala. (S.D. Ala. Aug. 9, I983) (Amendment to This Court's Order dated August 3, 1983).

[9] On August 4, 1983, the court amended the Judgment. Brown v. Board of School Comm'rs of Mobile County, Ala., Civ. Act. No. 75-298-P (S.D. Ala. Aug. 4, 1983) (Amendment to Judgment).

[10] Appellees, other than the United States, also requested the court to modify its August 3, 1983 Order and Judgment, as amended, to provide that elections for single-member Districts 1 and 5 will be held in 1983, and elections for single-member District 2 will be held in 1986, or, alternatively, that the designations of single-member Districts 2 and 5 will be switched. Plaintiffs' Response to Defendants' Motion for Reconsideration at 2. Appellees made this request on the grounds that, if elections are held in 1983, for single-member District 2 "a substantial portion of the present District 2 electorate will have voted for 2 commissioners in 3 years and most of the electorate in District 5 will be deprived of the right to vote in a school board election between 1976 and 1986." Id. The court did not act on appellees' request.

(1982); Wise v. Lipscomb, 437 U.S. 535, 541 (1978) (plurality opinion); id. at 550 (Marshall, J. dissenting); Connor v. Finch, 431 U.S. 407, 414 (1977);

35) The remedy the district court imposed would not satisfy even the standards for a "legislative plan" because, if elections are held pursuant to the court's August 3, 1983 Order and Judgment, as amended, persons in one district will have been allowed to vote for two (2) commissioners in three (3) years while persons in another district will not be allowed to vote for any commissioner for ten (10) years and one district will be represented by two (2) commissioners while another district will be unrepresented, 11/

a) when Commissioner Drago was elected in 1980, the districts were apportioned

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11/ This is based on the assumption the court intended to continue the residency requirements of its previous orders, see supra pp. 5,8,9. The court's August 3, 1983 Order and Judgment, as amended, did not provide a comprehensive remedy but, rather, was limited in scope to ordering elections to be held for commissioners from Districts 1 and 2. In view of the court's previously having imposed a residency requirement in other orders, which were more comprehensive and appear to have established the system under which the court, in its August 3, 1983 Order and Judgment, as amended, now has ordered elections, it is reasonable to assume that the court intended to require each commissioner to have lived in, and to live in for his or her tenure each in office, the district from which he or she is elected. If so, it is noteworthy that, as discussed at 9 infra, Commissioner Drago no longer lives in District 5 and, as applied to her, the residency requirement is not satisfied.

If it cannot be assumed that the court intended to continue the residency requirement, the absence of such a requirement, in and of itself, would raise questions as to the validity of the court's remedial order, particularly because commissioners from other single-member districts were elected with the residency requirement in effect and because it would allow persons to run for a district without actually having to reside therein.

(i) the persons living in District 4, which consists of 72,512 persons, Brown v. Board of School Commissioners of Mobile County, Alabama, Civ. Act. No. 75-298-P, typescript op. at 2 (S.D. Ala. Aug. 8, 1983) (Order on Plaintiffs' Motion for Modification of Districts), will be represented by two (2) commissioners, at least until 1986, [13] when Commissioner Drago's term is to expire, [14] see Affidavit of Joe McEarchern ¶¶4,5,

(ii) the persons living in District 5, which consists of 72,311 persons, Brown v. Board of School Commissioners of Mobile County, Alabama, Civ. Act. No. 75-298-P, typescript op. at 2 (S.D. Ala. Aug. 8, 1983) (Order on Plaintiffs' Motion For Modification of Districts), will have no representative until 1986, Affidavit of Joe McEarchern ¶8,

(iii) when elections are held in 1986, most of the electors living in District 5 will not have voted for ten (10) years, since 1976, when they voted for two (2) at-large commissioners, id. ¶6, and

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[13] Commissioner Cox was elected from District 4 in 1978 and an election for his position is scheduled for 1984.

[14] That Commissioner Drago would become a Commissioner for District 4 is due primarily to the fact that she no longer lives in District 5 and that, if she runs again for the School Board, she will run for, and will be responsive to the needs of the people living in, District 4. Following the expiration of her term, the next election in which Commissioner Drago may run is the 1990 election for District 4.

system which allows all persons to be represented equally and all electors to vote with the same degree of frequency; [15]

39) A stay of elections pending appeal will not harm appellees because, by virtue of the 1978 elections, there already are two black commissioners on the School Board and, according to the district court, it is unlikely that, under a single-member district system, respondents will be able to elect a third black commissioner, Brown v. Board of School Commissioners of Mobile County, Alabama, Civ. Act. No. 75-298-P, typescript op. at 9 (S.D. Ala. July 22, 1982) (Order Granting Stay);

40) If a stay is not granted, it is likely that appellants will be irreparably harmed because the School Board will be comprised exclusively of persons elected from single-member districts, and the court has not enjoined those persons, who are the direct beneficiaries of the

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[15] If the court notes probable jurisdiction, appellants anticipate that a decision could be rendered in time for the elections scheduled for 1984. Elections for four (4) commissioners could be held and the staggered term feature of the election system retained by providing that two (2) commissioners would serve four (4) years and two (2) commissioners would serve six (6) years. Although, under this scenario, the terms of two (2) commissioners would be shortened, under the district court's August 3, 1979 Judgment and Order, as amended, the terms of two (2) commissioners also would be shortened. Brown v. Board of School Comm'rs of Mobile County, Ala., Civ. Act. No. 75-298-P, typescript op. at 11 (S.D. Ala. Aug. 3, 1983) (Order).